RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 28 2014
OFFICE OF THE CLERK

Nos. 13-354, 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents,

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuit

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BRIEF *AMICUS CURIAE* OF AMERICAN JEWISH COMMITTEE AND JEWISH COUNCIL FOR PUBLIC AFFAIRS IN SUPPORT OF THE GOVERNMENT

MARC D. STERN
Counsel of Record
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10022
(212) 891-1480
sternm@ajc.org

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI* [1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. AJC views both religious liberty and the equal rights of women as basic American values essential to its core mission. In those rare instances where these interests may clash, as in this case, AJC believes rigorous scrutiny under the compelling interest standard is appropriate to uphold the equality and dignity of women while preserving and safeguarding sincerely held principles of faith.

AJC has a long-standing commitment to religious freedom. AJC was one of the original supporters of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), restoring the compelling interest test in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). As AJC explained at the time, the absence of strong protections for freedom of religion in the wake of *Smith* invited governments to "run roughshod over religious conviction." *See* Religious Freedom Restoration Act of 1993: Hearing on S. 2969 Before the H. Comm. on the Judiciary, 103d Cong. 1 (1993) (statement of Rev. Oliver S. Thomas, appearing on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee). AJC

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

views the protections afforded by RFRA as no less important today than at the time of its enactment.

AJC's commitment to equality for women is likewise integral to its history and mission. AJC regularly files *amicus* briefs before this Court and others in opposition to unequal treatment of women and other forms of gender bias. *See, e.g., Dept. of Human Resources v. Hibbs*, No. 01-1368, 2002 WL 31444460 (Oct. 25, 2002), Brief of The American Jewish Committee, *et al.* in Support of Respondents. Additionally, through its Jacob Blaustein Institute for the Advancement of Human Rights, AJC has been a leading voice calling attention to human rights issues of core importance to the Jewish community, including the promotion of equality for women in the United States and around the globe.

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 16 national and 125 local Jewish community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a pluralistic society. JCPA believes that reproductive health decisions are best made by individuals in consultation with their families and health care professionals and based on personal religious beliefs. JCPA also believes that restrictions on the right to choose and lack of access to services threaten this constitutionally protected individual right.

Thus, AJC and JCPA stand at the intersection of the competing interests in this case—religious freedom and equality and reproductive freedom for women—and are equally committed to both interests. AJC and JCPA submit this brief to aid the Court in the difficult task of balancing the government's interest in

promoting equality for women and public health against the religious liberty of those who oppose, on religious grounds, mandatory coverage for certain types of contraceptive care mandated under the Health Resources and Services Administration ("HRSA") Guidelines, 77 Fed. Reg. 8725 (Feb. 15, 2012) (the "Mandate"), pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010) ("ACA").

AJC and JCPA take no position on whether (i) a for-profit corporation has Free Exercise rights under the First Amendment or RFRA, or (ii) the Mandate imposes a substantial burden on religious practices. Rather, the question of concern to AJC and JCPA is, assuming the Mandate could be found to impinge upon the religious practices of those subject to its requirements, does it do so in furtherance of a compelling governmental interest and is it the least restrictive means of furthering that compelling governmental interest? AJC and JCPA respectfully submits that the Mandate furthers the government's compelling interests in promoting women's equality and public health in the least restrictive means available. Accordingly, AJC and JCPA support the government's position and oppose granting for-profit corporations an exception to the Mandate under RFRA.[2]

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[2] AJC previously filed an *amicus curiae* brief pertaining to the parties' respective petitions for writ of *certiorari*, arguing that although the petitions meet the criteria for review, it would be better to defer review until the records could be more fully developed. Nonetheless, the Court having granted *certiorari*, AJC submits that the present records satisfy the government's burden under RFRA.

SUMMARY OF ARGUMENT

This appeal presents the rare situation in which the government's important interests in promoting gender equality and public health are alleged to be in conflict with the religious liberty of corporations asserting religious objections to the government's policies. The claimants in these consolidated cases, Hobby Lobby Stores, Inc. ("Hobby Lobby"), Mardel, Inc. ("Mardel"), Conestoga Wood Specialties Corp. ("Conestoga"), and their owners (collectively, "Claimants"), seek an exemption under RFRA from the Mandate's requirement that Claimants offer health insurance benefits providing full coverage for all Food and Drug Administration ("FDA") approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity. *See* 77 Fed. Reg. 8725 (Feb. 15, 2012); 78 Fed. Reg. 39870 (July 2, 2013).

Claimants object to the Mandate on religious grounds, stating that it forces them to violate their sincerely held religious beliefs against drugs and devices that they believe to be abortifacients. Different corporations opposing the Mandate under RFRA have asserted different combinations of objections, ranging from those who oppose specific drugs or devices to those opposing all contraception in any form. Hobby Lobby and Mardel, for example, oppose two types of intrauterine devices and the emergency contraceptives commonly known as Plan B and Ella, while Conestoga opposes only Plan B and Ella. *See Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1123 (10th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 382 (3d Cir. 2013).

Assuming (without advocating for or against the view) that corporations have Free Exercise rights

under the First Amendment, and that the Mandate imposes a substantial burden on their religious practices, RFRA requires evaluation of the parties' important competing interests under the compelling interest standard. This requires a showing by the government that the Mandate (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §§ 2000bb-1(a), (b). That stringent burden has been met in this case.

The Mandate furthers two compelling governmental interests as applied to Claimants and their employees. First, it promotes gender equality by closing the wide disparity in out-of-pocket medical costs incurred by women in funding their own reproductive health needs, which, improves the social and economic standing of women. Second, it meaningfully enhances public health by reducing the negative health costs of unintended pregnancy, improving birth spacing, and reducing the number of women seeking invasive abortions. Contraceptive coverage also provides significant cost savings.

These are not abstract interests; they are particularized to Claimants and their employees. The Mandate reduces gender-based cost disparities and provides public health benefits to each employee who gains coverage for contraceptive care. All employees deprived of this coverage, whether in whole or in part depending on the scope of the particular religious objection asserted, will thus suffer a direct detriment. The availability of certain other statutory and regulatory exemptions to the ACA and the Mandate does not diminish the government's compelling interests; those exemptions involve separate interests,

and do not detract from the Mandate's promotion of equality and public health.

The Mandate is, moreover, the least restrictive means available to further the government's interests. The Mandate cannot function as intended unless it is applied evenly to all statutorily eligible employers and employees; each *ad hoc* exemption based on religious objections excludes employees from the coverage they would otherwise receive, deprives them of the economic and medical benefits of coverage, and undermines the Mandate as a comprehensive system designed to provide uniform benefits to covered employees. Claimaints' proposed alternatives impose an unworkable patchwork quilt of insurmountable administrative burdens upon the government, would be substantially and materially less effective than the Mandate, and may well fail even to address Claimants' own religious objections. For these reasons, Claimants are not entitled to an exemption from the Mandate under RFRA.

ARGUMENT

I. Laws Substantially Burdening Religious Liberty Are Properly Subject to RFRA's Particularized Compelling Interest Review

Congress passed RFRA in 1993 in reaction to *Smith*, which declared that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. 494 U.S. at 890. *Smith* held that the First Amendment does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* RFRA responded by adopting "a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v.*

O Centro Espirita Beneficente Uniao Do Vegtal, 546 U.S. 418, 424 (2006).

RFRA prohibits the federal government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," unless it can "demonstrate that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b). This is the same "compelling interest" test previously set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), prior to the Court's ruling in *Smith*. *See* 42 U.S.C. § 2000bb(b)(1).

The compelling interest test contemplates a "focused" rather than a "categorical" approach. *O Centro*, 546 U.S. at 430. The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (*quoting* 42 U.S.C. § 2000bb-1(b)). The Court therefore looks "beyond broadly formulated interests justifying the general applicability of government mandates" and scrutinizes "the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. Put simply, "context matters." *Id.* at 431-32 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 327 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995)).

This brief takes no position on whether a corporation has Free Exercise rights under the First Amendment or RFRA, nor on whether the Mandate imposes a substantial burden on the Free Exercise rights alleged. Rather, assuming the Mandate could be

found to substantially burden the religious practices of those subject to its requirements, this brief undertakes a focused, context-specific analysis of the Mandate's application to Claimants to assess whether it is the least restrictive means of furthering the compelling interests advanced by the government, which it is.

II. The Mandate as Applied to Claimants Significantly Furthers the Government's Compelling Interests in Promoting Gender Equality and Advancing Women's Health

The Mandate furthers compelling government interests with respect to all employees (and covered family members of employees) who come within its scope, including Claimants' employees. Hobby Lobby has approximately 13,000 full-time employees in over 500 stores, Mardel has just under 400 employees, and Conestoga has approximately 950 employees. *See Hobby Lobby*, 723 at 1122; *Conestoga*, 724 F.3d at 381. These more than 14,000 individuals and their covered family members experience direct and material benefits from the Mandate, furthering the government's interests in promoting gender equality and public health. These are interests "of the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and "paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), not in the abstract, but specifically as applied to Claimants and their employees. Granting Claimants their requested RFRA exemptions would thus weaken the government's particularized interest in promoting equality and public health for these employees.

A. Application of the Mandate to Claimants Furthers the Government's Compelling Interest in Promoting Gender Equality

The Mandate is a powerful tool for promoting and extending the reach of gender equality. The United States has a compelling interest in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984). This interest extends to "[a]ssuring women equal access to . . . goods, privileges, and advantages" enjoyed by men. *Id.* Providing full contraceptive coverage to Claimants' employees specifically advances the ACA's larger goal of providing women with equal access to the privileges and advantages of full health coverage.

The ACA "acknowledges that both existing health coverage and existing preventive services recommendations often did not adequately serve the unique health needs of women." 78 Fed. Reg. at 39873. A disparity prevailed in health coverage, which "placed women in the workforce at a disadvantage compared to their male coworkers." *Id.* "Even with employer-based coverage, women have higher out-of-pocket medical costs than men. Overall, women of reproductive age spend 68 percent more out of pocket than men on health care, in part because their reproductive health care needs require more frequent health care visits and are not always adequately covered by their insurance. Among women insured by employer-based plans, oral contraceptives alone account for one-third of their total out-of-pocket health care spending." *Korte v. Sebelius*, 735 F.3d 654, 724 (7th Cir. 2013) (Rovner, J., dissenting) (*quoting* J. Arons & L.

Rosenthal, Center for American Progress, *Facts About the Health Insurance Compensation Gap* (June 2012)). The Mandate closes this gap.

Full contraceptive coverage is an inseparable part of the ACA's cost-equalizing goal. Multiple studies show access to contraception "improves the social and economic status of women." 78 Fed. Reg. at 39873 (*citing* C. Goldin & L. Katz, *Career and Marriage in the Age of the Pill*, 90(2) Am. Econ. Rev. 461-65 (2000); C. Goldin & L.F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110(4) J. of Pol. Econ. 730-70 (2002); M.J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121(1) Q. J. Econ. 289-320 (2006)). By reducing unplanned pregnancy and the accompanying financial strain, expense, and potential loss of employment, access to contraception has "highly significant impacts" on the economic well-being of women. *Korte*, 735 F.3d at 725 (Rovner, J. dissenting) (*citing* Inst. of Medicine, Committee on Preventive Services for Women, *Clinical Preventive Services for Women: Closing the Gaps*, p. 103 (2011)). As this Court has observed, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 505 U.S. 833, 835 (1992)). *See also Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).[3]

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[3] The availability of oral contraception, for example, "played an important role in increasing the presence of women in the workforce, bringing them into more direct economic competition with men, and eventually improving women's wages." *Legatus v. Sebelius*, 901 F.Supp.2d 980, 992-93 (E.D. Mich. 2012) (citing

This is not an abstract interest; it is particularized in its application to Claimants and their employees. Lack of coverage for any preventive service, including contraception, generates "significant out-of-pocket expenses for women," and full coverage "is particularly critical to addressing the gender disparity of concern here." 78 Fed. Reg. at 39873 (*citing Clinical Preventive Services for Women*, at p. 19). The Mandate reduces the economic disparity of contraceptive costs for each woman who, by virtue of the Mandate's requirements, gains access to contraception she otherwise might not be able to afford, or could only afford at much greater out-of-pocket expense. At the same time, if deprived of the full coverage otherwise available under the Mandate, it is "unproven and unclear" how employees could "alternatively acquire, without cost-sharing, the full range of FDA-approved contraceptive methods in the absence of the [Mandate]." *Legatus v. Sebelius*, 901 F.Supp.2d 980, 995 (E.D. Mich. 2012).

If Claimants are granted an exemption to the Mandate under RFRA, therefore, more than 14,000 employees (or their covered family members) will be deprived in whole or in part of contraceptive coverage, imposing upon them and their covered family members the continuing burden of the out-of-pocket health cost disparity and the resulting consequences of gender inequality that the Mandate seeks to address. This is not a speculative social harm; the

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M.J. Bailey, *et al.*, *The Opt–In Revolution? Contraception and the Gender Gap in Wages*, 4 Am. Econ. J.: Applied Econ. 225 (2012); Goldin & Katz, *The Power of the Pill*). Though not all parties seeking a RFRA exemption oppose oral contraception, it provides one example of how restricting coverage to any FDA-approved method of contraception exposes women to adverse economic consequences.

consequences are specific to each woman deprived of full coverage for contraceptive methods she would otherwise obtain.

B. Application of the Mandate to Claimants Furthers the Government's Compelling Interest in Promoting Public Health

The government also has "a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp.2d 16, 43 (D.D.C. 2011). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978); *Kleindienst v. Mandel*, 408 U.S. 753, 783-84 (1972). That interest is particularly meaningful here, where the Mandate is directed to providing women with full coverage for contraceptive methods shown to enhance public health.

The role of full contraceptive coverage in promoting public health begins with the ACA's larger goal of expanding access to all preventive health care. The ACA reflects a determination by Congress that coverage of recommended preventive services "is necessary to achieve access to basic health care for more Americans." 78 Fed. Reg. at 39872. Individuals "are more likely to use preventive services if they do not have to satisfy cost-sharing requirements (such as a copayment, coinsurance, or a deductible)." *Id.* These services "result[] in a healthier population and reduce[] health care costs by helping individuals avoid preventable conditions and receive treatment earlier." *Id.* (*citing Clinical Preventive Services for Women*, at p. 16). Full coverage of preventive services thus helps "either prevent illness altogether or facilitate detection at an earlier stage when it is more amenable to treatment, thereby reducing the direct and indirect costs of illness otherwise borne by the insured, his

family, his employer, his insurer, medical providers, and the government." *Korte*, 735 F.3d at 724 (Rovner, J., dissenting).

With respect to contraceptive coverage, the Mandate results from the Women's Health Amendment to the ACA, introduced by Senator Barbara Mikulski, to expand the range of required preventive care "to include a separate set of preventive services for women." *Id.* The amendment recognized "that many women forego preventive screenings for the conditions that statistically are most likely to result in their death—breast, cervical, colorectal, ovarian and lung cancer, and heart and vascular disease—either because they lack insurance, the services are not covered by their insurance plans, or because the large copayments required by their insurance companies for these screenings are beyond their financial means." *Id.* The adoption of the Women's Health Amendment "recognized that women have unique health care needs," which "include contraceptive services." 78 Fed. Reg. at 39872 (*citing* S. Amdt. 2791 to S. Amdt. 2786 to H.R. 3590 (Service Members Home Ownership Tax Act of 2009) (Dec. 3, 2009); *Clinical Preventive Services for Women*, at p. 9).

The inclusion of contraception in preventive services for women "should come as no surprise," as "[n]inety-nine percent of American women aged 15 to 44 who have engaged in sex with men have used at least one form of birth control," and "[a] woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at p. 103); Guttmacher Inst., *Fact Sheet:*

Contraceptive Use in the United States, at 1 (Aug. 2013); W. Mosher & J. Jones, Centers for Disease Control, Nat'l. Ctr. for Health Statistics, *Use of Contraception in the United States: 1928–2008*, pp. 5, 15, & Table 1 (Aug. 2010)).

The documented public health benefits of the Mandate include:

- Reducing Unintended Pregnancy: "[W]omen experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. * * * Studies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39872 (*citing* J.D. Gipson, *et al.*, *The Effects of Unintended Pregnancy on Infant, Child and Parental Health: A Review of the Literature*, 39(1) Studies in Family Planning 18-38 (2008)). *See also Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at p. 103) ("Unintended pregnancies pose risks to both mother and fetus in that a woman, neither planning to be pregnant nor realizing that she is, may both delay prenatal care and continue practices (including smoking and drinking) that endanger the health of the developing fetus.").

- Improving Birth Spacing: "[C]ontraceptive use helps women improve birth spacing and therefore avoid the increased risk of adverse pregnancy outcomes that comes with pregnancies that are too closely spaced. Short interpregnancy intervals in particular have been associated with low birth weight, prematurity, and small-for-gestational age births."

78 Fed. Reg. at 39872 (*citing* A. Conde-Aguledo, *et al.*, *Birth Spacing and Risk of Adverse Perinatal Outcomes—A Meta-Analysis*, 295(15) JAMA 1809-23 (2006); B. Zhu, *Effect of Interpregnancy Interval on Birth Outcomes: Findings from Recent U.S. Studies*, 89 Int'l J. of Gynecology & Obstetrics S25-S33 (2005); E. Fuentes-Afflick & N. Hessol, *Interpregnancy Interval and the Risk of Premature Infants*, 95(3) Obstetrics & Gynecology 383-90 (2000)). *See also Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at p. 103) ("Intervals between pregnancies also matter, as pregnancies commencing less than eighteen months after a prior delivery pose higher risks of pre-term births and low birth weight.").

- Reducing Invasive Abortions: "[B]y reducing the number of unintended pregnancies, contraceptives reduce the number of women seeking abortions." 78 Fed. Reg. at 39872 (*citing Clinical Preventive Services for Women*, at p. 105; J. Peipert, *et al.*, *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120(6) Obstetrics & Gynecology 1291-97 (2012); J. Bongaarts & C. Westoff, *The Potential Role of Contraception in Reducing Abortion*, 31(3) Studies in Family Planning 193-202 (2000)). *See also Korte*, 735 F.3d at 725-26 (Rovner, J., dissenting) (citations omitted) ("[U]nintended and unwanted pregnancies naturally account for the lion's share of induced abortions.").

- Other Medical Benefits: Contraceptives have "medical benefits for women who are contraindicated for pregnancy, and there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy (for example, prevention of certain cancers, menstrual disorders, and acne)." 78 Fed. Reg. at 39872 (*citing Clinical Preventive Services for Women*, at p. 107). *See also Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at pp. 103-04) ("Pregnancy is contraindicated altogether for women with certain health conditions.").

Contraceptive coverage has also been shown to provide significant cost savings to health plans, due to the economic effect of reducing unintended pregnancies. A 2000 study "estimated that it would cost 15 to 17 percent more not to provide contraceptive coverage in employee health plans than to provide such coverage" after accounting for direct and indirect costs. 78 Fed. Reg. at 39872 (*citing* R. Bonoan & J.S. Gonen, *Promoting Healthy Pregnancies: Counseling and Contraception as the First Step*, Washington Business Group on Health, Family Health in Brief, Issue No. 3 (August 2000)).[4]

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[4] These findings have been borne out by experiences adding contraceptive coverage to the Federal Employees Health Benefits Program and by multiple cost savings analyses. *See* 78 Fed. Reg. at 39872-73 (*citing* C. Dailard, *Special Analysis: The Cost of Contraceptive Insurance Coverage*, Guttmacher Rep. on Public Policy (March 2003); R. Sawhill, *et al.*, *An Ounce of Prevention: Policy Prescriptions to Reduce the Prevalence of Fragile Families*, 20(2) Future of Children 133-55 (2010); J. Frost, *et al.*, *Contraceptive Needs and Services, National and State Data, 2008 Update* (2010)).

Again, this public health benefit is not abstract; it is specific in its application to Claimants and their employees. Depriving Claimants' employees and covered family members of contraceptive coverage under the Mandate through a RFRA exemption either deprives them of the direct health benefits of contraceptive coverage or obligates them to incur the unequal out-of-pocket costs of funding their own preventive services. The specific impact upon any individual employee may vary depending on the scope of the employer's religious objection and the particular contraceptive needs of the employee, but it cannot be questioned that more than 14,000 employees working for Claimants, as well as their covered family members, would be deprived in whole or in part of the public health benefits of full contraceptive coverage.

Even where, as in this case, Claimants' religious objections are limited to specific methods of post-coital emergency contraception such as Plan B, the public health consequences are very real. Plan B and similar emergency contraceptive measures reduce unintended pregnancies and induced abortions where primary contraception fails or is not used, and reduces state and federal healthcare expenditures. A. Ziebarth & K.A. Hansen, *Hormonal emergency contraception: a clinical primer*, 60(3) J. of the S.D. State Med. Ass'n 99 (2007); F. Davidhoff & J. Trussell, *Plan B and the Politics of Doubt*, 296 JAMA 1775, 1775 (2006). Its efficacy is time-sensitive and access is important; delaying the first dose even by several hours substantially increases the likelihood of pregnancy, and its efficacy diminishes linearly with time. *Id.* Even

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See also Korte, 735 F.3d at 725 (Rovner, J., dissenting) (*citing* Guttmacher Inst., *Fact Sheet: Facts on Unintended Pregnancy in the United States* (Oct. 2013)).

a limited religious objection, therefore, has the consequence of impeding access to emergency contraceptive methods necessary to the Mandate's public health objectives.

C. The Religious Employer Exemption and Other Exemptions to the Mandate Do Not Diminish the Government's Compelling Interests

Notwithstanding the demonstrated and particularized benefits of the Mandate in promoting the government's interests in gender equality and public health, Claimants and several courts have nonetheless argued that these are merely abstract interests, and have questioned their vitality as compelling interests. This argument relies upon the Court's statement in *O Centro* that the "invocation" of a "general interest in promoting public health and safety" or similarly "broadly formulated interests" are "not enough" to satisfy RFRA's compelling interest test. *See, e.g., Conestoga*, 724 F.3d at 413 (Jordan, J., dissenting) (*quoting O Centro*, 546 U.S. at 41, 435, 438). The "existence of numerous exemptions" already made to the Mandate—such as for religious employers, *see* 45 C.F.R. §§ 147.130, 147.131,[5] "grandfathered" plans, 42 U.S.C. § 18011, and employers with fewer than 50 full time employees, 26 U.S.C. § 4980H—is then cited as evidence of its

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[5] The regulations include both an "exemption" for religious employers who, *inter alia*, have as their purpose the inculcation of religious values and primarily employ persons sharing their religious tenets, 45 C.F.R. § 147.130(a)(iv)(B), and an "accommodation" for religious employers who, *inter alia*, are organized and operate as nonprofit entities and hold themselves out as religious organizations, 45 C.F.R. § 147.131(b). Houses of worship would generally fall in the first category, while religious colleges or schools may satisfy the second.

"arbitrary underinclusiveness" and as proof that no "compelling interest" would be undermined by extending a "similar exception" to a "similarly situated plaintiff." *Conestoga*, 724 F.3d at 413-14 (Jordan, J., dissenting) (*citing O Centro*, 546 U.S.at 433; *Newland v. Sebelius*, 881 F. Supp.2d 1287, 1297 (D. Colo. 2012)). *See also Hobby Lobby*, 723 F.3d at 1143-44; *Korte*, 735 F.3d at 686.

This attempt to employ *O Centro* to diminish the compelling nature of the government's interests under the Mandate is fundamentally misplaced. *O Centro* is both qualitatively and quantitatively inapposite to the present case. There, the Court could not reconcile the Controlled Substances Act's statutory exemption for religious use of mescaline in peyote, applicable to "hundreds of thousands of Native Americans practicing their faith," with the government's refusal to grant "a similar exception for the 130 or so American members of the UDV who want to practice theirs." 546 U.S. at 433. The Court found that the "mere invocation of the general characteristics" of controlled substances "cannot carry the day." *Id.* at 432.

O Centro thus dealt with the broad assertion of a general law enforcement interest to prevent conduct by a tiny group of individuals which was indistinguishable from essentially identical conduct already exempted from the law's reach as to hundreds of thousands of others. Here, by contrast Claimants are attempting to block the provision of benefits to third parties by invoking dissimilar exceptions with a narrower reach and entirely distinct focus from that proposed by Claimants' requested RFRA opt-out.

Unlike *O Centro*, this is not a case in which hostility or indifference to one group's sincere religious beliefs has manifested in capricious burdens on religious

practice. Nor do the exemptions to the Mandate for religious employers, "grandfathered" plans, and employers with fewer than 50 full time employees evidence the kind of extreme "arbitrary underinclusiveness" of a "similarly situated" party from an exception already afforded to many others on indistinguishable grounds. Rather, the Court is being asked to craft an entirely new exception to the Mandate, with profound and singularly harmful consequences compromising its public policy objectives.

1. The Religious Employer Exemption Does Not Reduce the Government's Compelling Interests

Beginning with the religious employer exemption, the regulatory record is clear that the government granted an exemption to the Mandate for religious employers due to the inextricable connection between their religious objections to the Mandate and their core religious purpose. Unlike a for-profit corporation, which may arguably hold the religious viewpoint of its owners but exists for a separate, predominantly economic purpose, a religious employer exists for a religious purpose and its objections to the Mandate arise from that religious purpose. *See* 45 C.F.R. §§ 147.130(a)(iv)(B), 147.131(b). There is "a demonstrable difference between a not-for-profit employer whose mission is expressly defined by religious goals and a secular corporation whose business is commerce for profit." *Korte*, 735 F.3d at 729 (Rovner, J., dissenting). Among other obvious differences, employees of a religious employer are on unequivocal notice of their employer's religious principles, while employees of a for-profit corporation may be entirely unaware of their employer's religious views.

The overt and predominantly religious purpose of non-profit religious employers not only magnifies the importance of their objection, but diminishes the likelihood of competing views between the employer and its employees on the subject of contraception. "Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874. This type of exemption is "a feature common to any number of federal statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–1(a), and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12113(d)[.]" *Korte*, 735 F.3d at 729 (Rovner, J., dissenting).

Moreover, unlike *O Centro*, where the Court extended an exemption already applied to hundreds of thousands of individuals to an additional 170 persons, here the Court is being asked to take an exemption of very limited applicability and offer it to an exponentially larger population. Religious workers comprise a negligible proportion of the United States workforce. The most recent data from the Bureau of Labor Statistics estimate religious workers to be only 0.054% of the workforce. *See* Bureau of Labor Statistics, *National Occupational Employment and Wage Estimates, United States* (May 2012) (available online at http://www.bls.gov/oes/current/oes_nat.htm#00-000).[6]

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[6] The Bureau of Labor Statistics' definition of religious employment likely differs in some respects from the standards used to define the religious employer exemption and accommodation to the Mandate, *see* 45 C.F.R. §§ 147.130(a)(iv)(B), 147.131(b), but

By comparison, the for-profit private sector accounts for more than 83% of the total workforce. *See* Bureau of Labor Statistics, *Table B-1a. Employees on nonfarm payrolls by industry sector and selected industry detail, seasonally adjusted* (Jan. 10, 2014) (available online at http://www.bls.gov/web/empsit/ ceseeb1a.htm).

This is not a "slippery slope"; the numerical consequences are immediate. Granting a RFRA exemption to Claimants alone and depriving their more than 14,000 employees of coverage would materially add to the very modest anticipated impact of the existing religious employer exemption. Moreover, even assuming only a small percentage of other private employers invoke similar RFRA exemptions, the impact in terms of employees excluded from coverage under the Mandate could be multiplied by magnitudes of hundreds or thousands. As discussed in the two preceding sections, each employee excluded from contraceptive benefits she would otherwise use suffers adverse consequences through exclusion from the Mandate's equalizing effects and its promotion of women's health. By expanding the reach of the very limited religious employer exemption far beyond its intended scope and regulatory purpose, therefore, Claimants would fundamentally compromise the goals of the Mandate.

2. The Grandfather Rule and 50-Employee Requirement Do Not Reduce the Government's Compelling Interests

Turning to the exemptions for "grandfathered" plans and employers with fewer than 50 full time employees, these are not even arguably "similar" to

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is nonetheless illustrative of the difference in magnitude between the existing regulatory exemption and Claimants' proposed RFRA exemption.

Claimants' proposed RFRA exemptions, nor are Claimants "similarly situated." Neither rule has anything to do with coverage of contraception. The "grandfather" rule is "designed to ease the transition of the healthcare industry into the reforms established by the [ACA] by allowing for gradual implementation of reforms through a reasonable grandfathering rule." 75 Fed. Reg. at 34541 (June 17, 2010). The 50-employee requirement is the minimum threshold for an employer to be subject to the requirements of the ACA; employers with fewer than 50 employees are not required to provide workplace coverage to their employees at all, with or without contraception. 26 U.S.C. § 4980H. These "are not specific exemptions to the contraceptive mandate; instead, they are general exemptions to the mandate that employers comply with all of the ACA's new essential minimum coverage requirements." *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (ABJ), --- F. Supp.2d ----, 2013 WL 6729515, *30 (D.D.C. 2013).

By seeking to use these exemptions to justify a new exception to the Mandate, Claimants appear to be arguing that, unless *all* employers are subject to the Mandate, the exclusion of *any* employer from its terms cannot be seen as contrary to a truly "compelling" government interest. That is a *non sequitur*. This is not a case in which Congress has left "appreciable damage to [a] supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (*quoting Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part)). The fact that Congress has adopted a reasonable transition plan through a grandfathering rule, and drawn economically sustainable boundaries around the scope of the ACA through the 50-employee

requirement, cannot be construed as inflicting "appreciable damage" on its interests in promoting gender equality and public health.

The grandfathering rule "balances [the ACA's] objective of preserving the ability to maintain existing coverage with the goals of expanding access to and improving the quality of health coverage." 75 Fed. Reg. at 34540. Gradual implementation of the ACA "does not appear to be indicative of how important the Government considers the interests of regulating public health and furthering gender equality." *Legatus*, 901 F. Supp.2d at 994. Nor does it denigrate the importance of any religious practices. Rather, it "seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests." *Id.* To hold otherwise would "perversely encourage Congress in the future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status." *Id.*

Moreover, it is virtually certain that a substantial majority of the grandfathered plans already provide contraceptive coverage. Even before the Mandate took effect, twenty-eight states had adopted mandates requiring insurers to include coverage of prescription contraceptives. *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting) (*citing* Nat'l Women's Law Center, *Guaranteeing Coverage of Contraceptives: Past & Present* (Aug. 1, 2012)). And a 2002 study found that more than 89 percent of insured plans covered contraceptives. 78 Fed. Reg. at 39873 (*citing* A. Sonfield, *et al.*, *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates*, 36(2) Perspectives on Sexual and

Reproductive Health 72-79 (2002)). In all events, the government estimated that grandfathered plans would relinquish their status over time, with between 33% and 69% estimated to do so by 2013. 75 Fed. Reg. at 34552. Whatever "damage" the grandfathering rule may be causing, therefore, is not appreciable and is diminishing over time.

Likewise, the 50-employee requirement does not arbitrarily exclude employees from contraceptive coverage; it acknowledges the "financial burdens associated with workplace health plans," and adopts an "entirely practical, logical, and justifiable accommodation to the financial needs of small employers, particularly in the first phase of a national effort to expand access to healthcare." *Korte*, 735 F.3d at 728 (Rovner, J., dissenting). Employees of these employers are not left without contraceptive coverage. Instead, like part-time employees, self-employed, and unemployed persons, they are "steered to the insurance exchanges established under the ACA, where the government offers subsidies to those who cannot shoulder the full cost of insurance on their own." *Id.*

Thus, neither the grandfathering rule nor the 50-employee requirement appreciably diminishes the government's compelling interests in pursuing gender equality and public health through contraceptive coverage under the Mandate. They "do not tend to show that the government has created so many specific exemptions to the contraceptive rules to counteract their efficacy in promoting public health and women's equality." *Roman Catholic Archbishop of Washington*, 2013 WL 6729515, at *30.

III. The Mandate Is the Government's Least Restrictive Means of Promoting Gender Equality and Protecting Women's Health

Having established the government's compelling interests in gender equality and public health under the Mandate, the next step under RFRA's compelling interest test is to evaluate whether application of the Mandate to Claimants is the least restrictive means of furthering these interests. 42 U.S.C. § 2000bb–1(b)(2). This Court has employed different methods of measuring whether application of a challenged policy constitutes the least restrictive means of furthering its purpose. One method is to consider whether the challenged policy is "overbroad" or "underinclusive." *Lukumi*, 508 U.S. at 546. Another method, often applied in the context of protected speech, is to ask whether the policy is the "least restrictive means among available, effective alternatives." *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (*quoting Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)).

Here, under either measure, applying the Mandate to Claimants and denying them a RFRA exemption is the least restrictive means to further the government's interests. The Mandate is neither overbroad nor underinclusive; its goals cannot be achieved less restrictively by granting RFRA exemptions to for-profit religious objectors, as the effectiveness of the policy depends upon mandatory, comprehensive national participation. Likewise, Claimants' proposed alternatives are not remotely workable as means of accomplishing the same interests, and may not even address Claimants' own religious objections.

A. The Mandate Is Not Overbroad or Underinclusive as Applied to Claimants

Claimants' position that the Mandate is overbroad or underinclusive, and therefore fails the least restrictive means test under *Lukumi*, largely overlaps the argument addressed in the preceding section that the government's interests are not sufficiently "compelling" due to the existence of other exemptions. *See* Section II.C, *supra*. And it suffers from the same erroneous reasoning. The argument describes the mandate as "self-defeating" because it "fail[s] to prohibit nonreligious conduct that endangers [its asserted] interests in a similar or greater degree" by granting "small businesses, businesses with grandfathered plans (albeit temporarily), and an array of other employers" an exemption from the Mandate or the ACA. *See, e.g., Gilardi v. U.S. Dept. of Health and Human Services*, 733 F.3d 1208, 1222 (D.C. Cir. 2013).

The errors in this mischaracterization of the grandfathering rule, 50-employee requirement, and religious employer exemption as "self-defeating," and the fundamental flaws in the assumption that the exemptions "endanger[]" the government's interests in gender equality and public health in a "similar or greater degree," have already been addressed and need not be repeated here. *See* Section II.C, *supra*. As discussed above, none of the current exemptions are contrary to the government's interests in a generally applicable contraceptive mandate as a means of promoting women's equality and health. *Id*. Accordingly, they do not render the Mandate overbroad or underinclusive.

Moreover, this Court already considered and rejected the same argument in *United States v. Lee*, 455 U.S. 252 (1982). There, the Court considered

whether imposition of Social Security taxes is unconstitutional as applied to persons of the Amish faith, who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. *Id.* at 254. Notably, Congress had already provided a statutory exception accommodating self-employed Amish and members of other religious groups with similar beliefs. *Id.* at 255 (*citing* 26 U.S.C. § 1402(g)). This exception was unavailable to the claimant in *Lee*, because it extended only to the self-employed, not employers and employees, leading the claimant to seek a constitutional exemption. *Id.* at 256.

The Court rejected the requested exemption, holding that the requested judicial narrowing of the Social Security statute's general rules of applicability was incompatible with the government's compelling interest in preserving a "nationwide" system which "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.* at 258. The Court observed that "mandatory participation is indispensable to the fiscal vitality of the social security system," as providing for "voluntary participation" by religious objectors in a "comprehensive national social security system" would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Id.*

The Court further held that accommodating the Amish belief and granting a constitutional exemption to participation in the Social Security system would "unduly interfere with fulfillment of the governmental interest," notwithstanding the existing statutory exception for self-employed Amish. *Id.* at 259-60. The Court observed, "To maintain an organized society

that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated . . . but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" *Id.* at 259 (*quoting Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)). Attempting to accommodate a nationwide system with "myriad exceptions flowing from a wide variety of religious beliefs" would impede its ability to function. *Id.* at 259-60.

Thus, while "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause," every person "cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *Id.* at 261. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.*

Here, much like the claimant in *Lee*, Claimants seek a religious exception carving themselves out from a comprehensive nationwide system of insurance designed to serve the public interest by providing uniform contraceptive coverage benefits. Yet by eliminating coverage, whether in whole or in part, for preventive contraception, Claimants' proposed RFRA opt-out would immediately undermine the Mandate's basic purpose and interests by imposing "a significant barrier to access to contraception." 78 Fed. Reg. at 39873.

Claimants' requested exemption to the Mandate cannot be reconciled with the government's direct interests in promoting gender equality and public health for Claimants' employees, whose own beliefs

and interests are left unaccounted in Claimants' proposed relief. Nor can the government plausibly be expected to find adequate *ad hoc* work-arounds to accommodate Claimants' religious objections, much less the "myriad" other exceptions flowing "from a wide variety of religious beliefs." *Lee*, 455 U.S. at 259-60. Claimants cannot superimpose their limits of conscience and faith to unduly interfere with both the basic purpose and administration of the Mandate. *See id.* at 261.

Courts allowing RFRA exemptions to the Mandate have acknowledged *Lee* and recognized the "private veto" concern associated with granting such religious exemptions, but state that *Lee* requires proof of "the incompatibility of the requested religious exemption" with the statute, to such a degree as to "render the statutory scheme unworkable." *See, e.g., Gilardi*, 733 F.3d at 1223. It is suggested that depriving employees of contraceptive coverage under the Mandate would not render the entire scheme unworkable, because they "will still receive an array of services" apart from the objected contraception methods, which "by and large fulfills the statutory command for insurers to provide gender-specific preventive care." *Id.* at 1224.

That is too glib by half. The benefits to women's equality and public health arising from the Mandate are not generalized to "gender-specific preventive care" writ large; they are particularized to full coverage of contraceptive care, based on the consensus recommendations of an independent panel of medical experts. *See* Sections II.A, B, *supra*; *Clinical Preventive Services for Women*, at pp. 9, 103-07. Depriving Claimants' employees (as well as other similarly situated private employees) of full contraceptive coverage thus deprives them of an entire category of medical

care with acknowledged and demonstrable economic and medical benefits, which cannot be recovered through the provision of unrelated "gender-specific preventive care." *Id.* Even other methods of contraception do not provide the same health benefits as emergency post-coital contraception such as Plan B and Ella. *See* Section II.B, *supra*. A RFRA exemption, even a limited one, thus renders the Mandate unworkable by depriving large numbers of employees, including all of Claimants' employees, of the coverage benefits the Mandate is designed to provide on a nationwide, uniform basis.

B. Claimants' Proposed Alternatives Are Not Less Restrictive Means of Furthering the Same Interests

Turning to the second method—a comparison of the Mandate against available, effective alternatives—in the dozens of RFRA cases brought by private corporations seeking exemptions from the Mandate, no alternative has emerged that is remotely workable and would effectively further the same compelling interests in a less restrictive manner. The analysis of available, effective alternatives does not obligate the government to refute "every conceivable option" that "the ingenuity of the human mind, especially if freed from the practical constraints of policymaking and politics," could imagine. *United States v. Wilgus*, 638 F.3d 1274, 1288-89 (10th Cir. 2011) (*quoting Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996)).[7] Nonetheless, given the volume of RFRA litigation arising in response to the Mandate, it is reasonable to

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[7] *See also Fowler v. Crawford*, 534 F.3d 931, 940 (8th Cir. 2008); *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41 n. 11 (1st Cir. 2007); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997).

expect that any alternative that could plausibly be conceived has at this point been proposed.

Here, Claimants' alternatives all involve some variation of publicly-funded contraception programs, through (i) expanded funding of existing federal or state government subsidized contraception programs, (ii) tax credits to women forced to incur the costs of buying their own contraception, (iii) a government-offered free or subsidized contraception coverage plan, or (iv) incentives to insurance or pharmaceutical companies to offer contraceptives to vulnerable populations. *See, e.g.*, Conestoga Br., at pp. 63-64. The D.C. and Seventh Circuits have accepted similar proposals as "less restrictive" means of achieving the same ends as the Mandate. *See Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222. They are mistaken. The proposed alternatives are wholly unworkable and may not even adequately address Claimants' own religious objections.

With respect to workability, as noted in *Lee*, it is "difficult, if not impossible, to administer" *ad hoc* exclusions to accommodate a "myriad" of objections stemming "from a wide variety of religious beliefs." 455 U.S. at 258-60. Claimants' alternatives describe outcomes, not implementation. It is easy enough to assert that employees excluded from contraceptive coverage as a consequence of RFRA opt-outs could receive alternative coverage through existing contraception programs, tax credits, a new coverage plan, or incentives to private industry, but the burden to devise, enact, fund, and implement these new or expanded programs would fall on the government.

As concerned this Court in *Lee*, it would be difficult if not impossible for the government to track individ-

ual employees excluded from different types of coverage due to case-specific RFRA religious objections, to identify the specific methods of contraception for which each of these employees has been denied coverage, to devise new coverages to make up these employee-specific gaps, to inform the employees of their alternative options, to secure enrollment and participation in these alternative options, or to fund these programs from the public coffers. When the proposed alternatives are scrutinized, a "host of administrative and logistical problems" emerge, raising serious questions as to their workability. *Legatus*, 901 F.Supp.2d at 995-96. It is "not feasible to expect the government to establish a public insurance option that picks up responsibility for the crazy-quilt of individual services that any individual employer might find incompatible with his individual religious beliefs." *Korte*, 735 F.3d at 727 (Rovner, J., dissenting).

Even if Claimants' proposed alternatives could be enacted and implemented, which they cannot, they could not work even remotely as effectively as the Mandate. The provision of comprehensive preventive care for women under the Mandate, including full coverage of all methods of contraception, is designed to redress "a history of gender-based inequalities in healthcare and health insurance." *Korte*, 735 F.3d at 727 (Rovner, J., dissenting). Carving out contraceptive coverage in whole or in part and requiring it to be provided separately, in addition to requiring "[a]dditional transaction costs," also "reinforces the very disparities that motivated the [Women's Health] Amendment" by segregating contraception from standard insurance coverage and "stigmatiz[ing] both these services and the employees who wish to access them." *Id.* It is difficult to see how a segregated contraception program requiring separate enrollment

and participation could secure anywhere close to the same level of adoption as full coverage of contraceptive services as part of standard preventive insurance coverage.

Additionally, it is questionable whether Claimants' alternatives even address Claimants' own religious objections to the Mandate, much less whether they would address other corporations' objections, insofar as the alternatives only shift Claimants' financial support of the objectionable contraceptives from one pocket to another. Conestoga, for example, objects to the Mandate's command "to buy a healthcare policy that funds abortifacients in conflict with their religious beliefs regarding the destruction of human life." Conestoga Br., at p. 13. From this statement, the religious objection arises from compulsory funding of the contraceptive methods at issue. Yet Claimants' alternatives would all require the diversion of public funds from other uses to fund the same abortifacients for Claimants' employees, with Claimants' tax dollars thus being used in place of health insurance costs to pay for the objectionable methods of contraception.

Conestoga has not taken the position that it finds compulsory funding of abortifacients through its tax dollars less religiously objectionable than compulsory funding through healthcare policies. Nor could it make that claim on behalf of other religious objectors. As the Court observed in *Lee*, there is no "principled way" to distinguish between "general taxes" used to fund religiously objectionable activities and taxes imposed under the Social Security Act. 455 U.S. at 260. Similarly, Claimants' proposed alternatives do little more than change the funding source without eliminating the objectionable compulsory funding of abortifacients.

Thus, whether measured by the standard of overbreadth, underinclusiveness, or available, effective alternatives, the Mandate is the least restrictive means of furthering the government's compelling interests in promoting gender equality and public health through full coverage of all methods of contraception.

CONCLUSION

A nation as large, diverse, and religiously inclusive as the United States simply could not function if it were required to accommodate every citizen's religious objections under all circumstances. Where the government undertakes action in furtherance of an important interest, but which is offensive to the sincerely held religious beliefs of some of its citizens, as is the case here, RFRA prescribes the rigorous standard under which the competing claims must be analyzed. And where the government meets its burden, as it has in this case, of demonstrating that its actions are both in furtherance of a compelling governmental interest and the least restrictive means of doing so, it may proceed. Here, the Mandate furthers the compelling interests of promoting women's equality and improving the public health through coverage of preventive contraceptive care without cost sharing. It is the least restrictive means of furthering these interests. For these reasons, the Court should reject Claimants' requests to be exempted from the Mandate under RFRA.

Respectfully submitted,

MARC D. STERN
Counsel of Record
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10022
(212) 891-1480
sternm@ajc.org